Media
Update
Ely Place Chambers

Additional Liabilities: Still Recoverable

William McCormick QC

In *TNL v Flood; Miller v ANL; Frost v MGN* [2017] UKSC 33, the latest battle in the costs war being fought out in the Supreme Court over the recoverability of CFA success fees and ATE premiums resulted in another defeat for the paying parties but may have left the field clear for further skirmishes. As the Court proceeded on a series of assumptions, some fundamental issues remain unresolved, although it seems that the basis on which the appeals were dismissed offers a reasonable degree of certainty in publication cases for litigants who rely upon CFAs/ATE, the lawyers who take on such cases, and those who face the prospect of paying additional liabilities.

The SC heard these appeals together because each raised the fundamental issue whether the recoverability of CFA success fees and/or ATE premiums against "newspaper media defendants" was an infringement of the Article 10 rights of those defendants. This was (as far as CFA success fees was concerned) the argument rejected by the House of Lords in *Campbell v MGN (No.2)* [2005] 1 WLR 3394 but accepted by the ECtHR in *MGN Ltd v UK* (2011) 53 EHRR 5 and at the heart of the cases as argued therefore was whether or not to adopt the latter as domestic law.

The Media Lawyers Association had intervened in *Lawrence v Fen Tigers Ltd (No.3)* [2015] 1WLR 3485 in an effort to have the SC take that step, but the majority declined to do so because the impact of Art 10 required a different analysis to that being undertaken at that time. This was therefore the newspaper Appellants' (all members of the MLA) second bite at this particular cherry.

In each of the Flood and Miller cases a libel case had been defended hard and unsuccessfully up to and including the CA (and in Flood to the SC). Frost involved the equally hard fought and equally unsuccessful "hacking" cases.

In Miller and Frost, High Court judges had ruled that recovery of additional liabilities did not infringe Art 10, considering Campbell to be binding (as to CFAs) and noting that if *MGN v UK* was to the contrary, it was for the SC to say so. Both judges granted "leap-frog" certificates allowing the matter to proceed directly to the SC, partly because the same issue was to be considered as part of the wider ongoing costs appeal in Flood.

As to whether or not the SC should "take account of" *MGN v UK* by following it (and hence incorporating it into domestic case law) the Respondents argued that there were cogent reasons for not doing so. As to decision itself they pointed out that: (1) it did not take into account the reliance on CFAs (and ATE) to promote Art 10 rights but assumed that only claimants funded litigation in that way; (2) the ECtHR also wrongly assumed that persons relying on CFAs would not have ATE (the then fashionable so-called "blackmail" effect) whereas it was far more usual that a CFA and ATE would both be obtained; (3) the EctHR wrongly assumed that litigants had no liability under CFAs beyond the sums recovered inter partes; (4) that some of the statistics within government materials cited by the ECtHR were demonstrably inaccurate or of no real assistance on the points at issue. It was suggested that these flaws were the result both of the lack of any oral argument whatsoever and of the almost impossible position of the UK government before the ECtHR in defending a scheme which it had spent years attacking.

The Respondents also placed some importance on the little-known remedies hearing in *MGN v UK* (reported at (2012) 55 EHRR SE9) which awarded MGN compensation on a basis Lord Neuberger found "impossible to assess" [11] but which may (as the UK argued it should) have allowed for the recoverability of some success fee, albeit not at the levels paid to Ms Campbell (100% and 95%). The Appellants were challenging the compatibility with Art 10 of ANY recoverable success fee; the Respondents argued that *MGN v UK* did not go that far.

The Respondents also argued that events since *MGN v UK* militated against it being followed. Such events fell into 2 broad categories: (1) the changes in substantive and procedural law which were generally said to have re-balanced libel law in favour of defendants and to have reduced costs; (2) the inability of Parliament to agree any scheme to replace that which was under attack, including Jack Straw MP's 2010 attempt to cap success fees at 10% which Parliament rejected and the exclusion of such cases from the implanted LASPO reforms as a result of the Leveson Report.

Having heard these arguments the SC, in a single judgment delivered by Lord Neuberger, decides that ruling whether *MGN v UK* should be followed is not appropriate because the UK government, *"the party who would be, at least potentially, most detrimentally affected, by the decision is not before us."* Although no party was seeking a declaration of incompatibility, a ruling *"could have very similar consequences"* and would not be made [29]. On that basis, although he considers some of the arguments deployed against following *MGN v UK* [30-40] and concludes at [41] that he *"rather doubt[s]"* that those points would justify refusing to follow the ECtHR's lead, he expressly leaves the point open.

The judgment proceeds on the assumption that

"where a claim involves restricting the defendant's freedom of expression, than at least where the defendant is a newspaper or broadcaster, it would, as a matter of domestic law, normally infringe the defendant's article 10 rights to require it to reimburse the success fee and ATE premium for which the claimant is liable under the 1999 Act regime." [27]

He then turns to the question of whether, on that assumption, additional liabilities can be recovered. At [44] he refers to the analysis of the overall 1999 scheme in Lawrence as a reason not to dis-applying any single aspect of the scheme, before making the further the assumption that if *MGN v UK* represents the law, s.6 HRA requires that additional liabilities not be recoverable, in the absence of a good reason.

Lord Neuberger than examines whether or not there is *"a good reason"* which permits the recoverability of additional liabilities. He decides that there is and his reasoning echoes aspects of the judgment in Lawrence [106] and the very recent decision in *Plevin v Paragon Personal Finance* [2017] UKSC 23, to the effect that where persons have acted on the basis of what appears to be the established legal order it would work *"plain injustice"* to deprive those persons of the rights that they had (or believed that they had) and that doing so would probably be in itself a breach of their rights under A1P1. He points out that retrospective deprivation of accrued rights will only be permitted if it is proportionate, requiring a suitable balance of the general interest of the community and the protection of the individual's fundamental rights (*Pressos v Belgium* (2003) 38 EHRR 12) and finds it *"very difficult to see how Mr Miller's A1P1 claim could be defeated"* given that Parliament had not made LASPO retrospective and that, even now, the 1999 Act regime still applies to proceedings commenced before 1 April 2013.

Lord Neuberger also expresses the view (relying again on similar remarks in Lawrence [77]) that denying recoverability could infringe Mr Miller's Art 6 & 8 rights, in that it would prevent access to justice to vindicate his personal dignity, and could be such an infringement even if imposed after the trial process concluded.

He rejects (as did the SC in Lawrence [91-2]) the argument that claimants would not be prejudiced by the lack of recoverability because lawyers or insurers could not or would not force them to pay those sums, and (as in Lawrence) offers the prospect that the lawyers concerned might also have a valid complaint that their A1P1 rights were being infringed. [55]

The Court therefore faced a choice. On the assumptions it made, allowing recovery of additional liabilities would infringe ANL's Art 10 rights, while denying recovery would infringe Mr Miller's A1P1 rights (and possibly others). But Lord Neuberger decides that denying recovery would also

"undermine the rule of law. It is a fundamental principle of any civilized system of government that citizens are entitled to act on the assumption that the law is as set out in legislation (especially when its lawfulness has been confirmed by the highest court in the land), secure in the further assumption that the law will not be changed retroactively – i.e. in such a way as to undo retrospectively the law upon which they committed themselves." [53]

While freedom of expression is also a fundamental principle it is

"not so centrally engaged by the issue in this case: the decision in MGN v UK is essentially based on the indirect, chilling, effect on freedom of expression of a very substantial costs order." [53]

Faced with this choice Lord Neuberger was able to choose between the respective breaches, making the choice that was *"just and appropriate"* as provided for in s.8 HRA, and it was

"clear to me that it should be ANL that suffers, as the injustice on Mr Miller would be significantly more substantial." [56]

The disposal of the Miller and Flood appeals was thus on far narrower grounds than those advanced, with the wider grounds being left undecided. And on the narrow grounds, the position of persons who entered into CFA and ATE agreements after the decision in *MGN v UK* could have been uncertain, but the approach to the Frost appeal dealt with that.

The Frost claimants entered into their arrangements after *MGN v UK*, but Lord Neuberger did not consider that this made any difference to the outcome, because even after that decision, the law of the UK remained as set out in Campbell pursuant to the regime laid down by Parliament in s.2(1) HRA. It would seem that pending a further challenge (including the involvement of the UK government) this provides reassurance to those who continue to rely upon CFAs and ATE.

It might also bring a wry smile to the lips of some that one of the newspapers most anxious to "free" the UK of the influence of all things European, has been told that persons will be able to continue to recover additional liabilities from it precisely because what the ECtHR said in its favour does not become UK law until UK judges say that it does!

However, Lord Neuberger says that a *"more fundamental"* reason that MGN cannot rely upon the assumed rule is that its conduct was (exceptionally) such as to set it outside the protection provided by *MGN v UK*. [63]

There is no certainty whether *MGN v UK* will (if the point returns to the SC) be taken to represent domestic law. Nor is it clear what *MGN v UK* decides. By way of examples:

(1) does it bar the recoverability of ANY success fee or only those at or close to 100%?

(2) does it only protect newspapers or broadcasters?

(3) does it bar recovery on the part of parties vindicating Art 10 rights?

(4) does it apply to ATE premiums?

(5) is it affected by the new proportionality test and/or *BNM v MG*N?

The scope for further rounds of litigation is obvious and with Parliamentary time being diverted to Brexit, it seems highly unlikely that the long awaited, politically toxic and repeatedly delayed legislative intervention will resolve matters. It seems only a matter of time before the same issues are revisited.

However, the refusal to disturb agreements entered into in reliance on settled domestic law provides considerable practical certainty. Whatever any later challenge may decide it seems that there is no judicial appetite for disrupting arrangements made under the 1999 scheme (however flawed it was).

While one might quibble over whether allowing these appeals would in truth have entailed any greater element of retrospectivity than allowing an appeal on any other issue and declaring that the law has long been misunderstood by all those who have relied upon it, the desire to deal in the practicalities of litigation funding is refreshing and the certainty (if not the result) should be welcome to all involved. ■

William McCormick QC was leading counsel for Mr Miller.

Ely Place Chambers

Contact us

Call 020 7400 9600
or email our clerks at
admin@elyplace.com

Ely Place Chambers,
13 Ely Place, London EC1N 6RY
DX: 291 London Chancery Lane